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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

Jamie McCurdy,

Petitioner

v.

Arkansas State Police

Respondent

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Eighth Circuit err in holding that the employer could avoid vicarious liability under *Burlington Industries, Inc. vs. Ellerth,* 524 U.S. 742 (1998) and *Faragher vs. City of Boca Raton,* 524 U.S. 775 (1998) when the employee promptly complains?

PARTIES TO PROCEEDING

The parties to the proceeding are set forth in the case caption. Petitioner Jamie McCurdy is an individual. The Arkansas State Police is an agency of the State of Arkansas.

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OPINIONS BELOW

The September 7, 2004, order denying a rehearing and rehearing *en banc* is not reported and it is reprinted at App. 1a. The July 23, 2004, Eighth Circuit panel opinion is reported at 375 F.3d 762 (8th Cir.2004) and is reprinted at App. 1b - 47b. The August 4, 2003 opinion and order of the United States District Court for the Eastern District of Arkansas for the Eastern District of Arkansas is reported at 275 F.Supp.2d 982 (E.D.Ark.2003) and is reprinted at App. 1c-42c.

JURISDICTION

The Eighth Circuit issued its order denying the rehearing en banc and rehearing on September 7, 2004. This petition for certiorari is timely in that Petitioner has filed it within 90 days of September 7, 2004. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation and application of Title VII of the Civil Rights Act of 1964 ("Title VII"), 29 U.S.C. § 2000e *et. seq.* Specifically, 42 U.S.C. §§ 2000e2(a)(1) and 2000e-2(m) are the relevant statutes involved in this Petition.

42 U.S.C. § 2000e-2(a)(1) provides:

> (a) Employer practices
>
> It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin[.]

42 U.S.C. § 2000e-2(m) provides:

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice

STATEMENT OF THE CASE

I. Overview of the Case

The Eighth Circuit held that the district court properly granted summary judgment on the affirmative defense created by this Court in *Burlington Industries, Inc. vs. Ellerth,* 524 U.S. 742 (1998) and *Faragher vs. City of Boca Raton,* 524 U.S. 775 (1998) even though the petitioner promptly reported the severe act of sexual harassment by a supervisor. One judge dissented from the panel decision. The court *en banc* denied a rehearing with four judges willing to grant the petition for a rehearing *en banc*.

II. Background of the Case

Jamie McCurdy was employed by the Arkansas State Police as a radio dispatcher. While on duty at the State Police headquarters in Little Rock, Arkansas, the Petitioner was subjected to single incident of severe sexual harassment. An individual who held the rank of sergeant and was a supervisor with the Arkansas State Police entered the radio room where he made several crude comments to the Petitioner and grabbed her breast. The Petitioner promptly reported the incident. The Arkansas State Police then conducted an investigation that took approximately three months. At the conclusion of the investigation, the sergeant was terminated for having lied during the investigation, but not for having grabbed the Petitioner's breast. The sergeant was

subsequently put back to work by the Arkansas State Police Commission but reduced in rank.

The Petitioner filed a timely charge with the Equal Employment Opportunity Commission prior to the Arkansas State Police taking any action and subsequently filed this Title VII case alleging hostile work environment.

III. Proceedings Below

The original action was brought under 42 U.S.C. § 2000 e-2. The jurisdiction of the district court was pursuant to 28 U.S.C. § 1331.

REASONS FOR GRANTING THE PETITION

Reason 1
The Decision of the Eighth Circuit Conflicts with the Decisions of this Court in *Burlington Ind. vs. Ellerth,* 524 U.S. 742 (1998) and *Faragher vs. City of Boca Raton,* 524 U.S. 775 (1998)

Supreme Court Rule 10 identifies considerations used by the Court in deciding whether to exercise its discretion to grant a petition for writ of certiorari. One consideration is that a "United States court of appeals has decided an important question of

federal law . . . that conflicts with relevant decisions of this Court." Another consideration is that a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter . . ."

Both of these considerations are present in this case. The uniformity of application of decisions of this Court throughout the United States in employment cases is extremely important. According to the records of the Equal Employment Opportunity Commission, in fiscal year 2003, 13,566 charges of sexual harassment were filed with the E.E.O.C.

The Court in its decisions rendered in *Ellerth* and *Faragher* set forth a national standard for an affirmative defense to vicarious liability for employers when there was no tangible job action resulting from supervisor misconduct. "The defense comprises two necessary elements: (a) that the employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective

opportunities provided by the employer or to avoid harm otherwise." *Burlington Industries, Inc. vs. Ellerth,* 524 U.S. at 765 (1998); *Faragher vs. City of Boca Raton,* 524 U.S. 775, 807 (1998).

In *Pennsylvania State Police vs. Suders,* __ U.S. __, 124 S.Ct. 2342, 2353-2354 (June 14, 2004), this Court stated:

"...we have held that when no tangible employment action is taken, the employer may defeat vicarious liability for supervisor harassment by establishing, as an affirmative defense, both that 'the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior,' and that 'the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

...Title VII, the Court noted, 'borrows from tort law the avoidable consequences doctrine,' *Ellerth,* 524 U.S. at 764, under which victims have 'a duty "to use such means as are reasonable under the circumstances to avoid or minimize the damages" that result from violations of the statute,'... But both decisions place the burden squarely on the defendant to prove that the plaintiff unreasonably failed to avoid or reduce harm. (Defendant has burden of persuading factfinder 'plaintiff could reasonably have reduced his loss or avoided injurious consequences.')"

This Court made clear that the *Ellerth/Faragher* defense is available when "...the defendant ... allege[s] and prove[s] that plaintiff failed in [the duty to mitigate harm]" *Pennsylvania State Police vs. Suders, supra,* 124 S.Ct. at 2357.

The decision of the Eight Circuit found that the Petitioner, who had promptly taken advantage of the preventive corrective opportunities is nonetheless barred from seeking relief because of the affirmative defense created by *Ellerth* and *Faragher.* The Court of Appeals decision appears to ignore this Court's clear language that as part of the defense, the plaintiff has to have failed "to mitigate harm." *Pennsylvania State Police vs. Suders, id.* In the Eighth Circuit an employer can avoid liability for hostile work environment cases when there is no tangible employment action both when the employee fails to report and when they do report the conduct.

The Eighth Circuit's decision in this case therefore basically has eliminated the hostile work environment cause of action under Title VII whenever the employer meets only the first prong

775 (1998), and *Burlington Industries, Inc. vs. Ellerth,* 524 U.S. 742 (1998). If the employee is subjected to harassment and fails to report it, then the employer is not liable under *Ellerth/Faragher;* if the employee promptly reports the conduct then the employer is not liable under *McCurdy, id.*

Reason 2
The Decision of the Eighth Circuit Conflicts With the Clear Decisions on the Same Question by Two Other Circuits and Appears to Conflict With a Third Circuit's Decision.

The first court to state that the second prong of the *Faragher/Ellerth* defense did not have to be met was a single judge's opinion in the case of *Indest vs. Freeman Decorating,* 164 F.3d 258 (5th Cir.1999). It was the opinion of Judge Jones in *Indest vs. Freeman Decorating Id.* that was the foundation of the District Judge's reasoning to grant summary judgment in this case to the Respondent on the *Faragher/Ellerth* defense. (App. 36a)

The position of Judge Jones in *Indest vs. Freeman Decorating, id.* was later rejected by implication in *Watts vs. Kroger Co.,* 170 F.3d 505 (5th Cir. 1999). The Court in that case stated:

"'When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.' That affirmative defense consists of two prongs, both of which the employer must fulfill: '(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the Plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.," *Faragher*, 524 U.S. 775, 118 S.Ct. at 2293. (Emphasis added.) *Watts* vs. Kroger Co., supra, 170 F.3d at 509-510.

The Court of Appeals for the 10th Circuit in *Harrison v. Eddy Potash, Inc.*, 248 F.3d. 1014 (2001) *cert.den.* 534 U.S. 1019 (2001) rejected the interpretation concerning the *Ellerth/Faragher* affirmative defense, adopted by the Eighth Circuit Court of Appeals in this case. The Court in *Harrison v. Eddy Potash, Inc, id.* in a well reasoned opinion, dissected the soundness of Judge Jones' opinion in

Indest v. Freeman Decorating, Inc., id. The Court stated:

"There are several major problems with *Indest.* First, it represents the views of only one member of the three-judged panel that decided the case. The other two members of the panel concurred in the judgment only, and one of the concurring judges wrote a separate, subsequent published concurring opinion expressly rejecting the analytical framework enunciated in *Indest v. Freeman Decorating, Inc.,* 164 F.3d 258 (5th Cir. 1999) (*Indest II*) ('I cannot agree with Judge Jones's conclusion that the Supreme Court's remarkably straightforward and perfectly consistent twin opinion in [*Faragher* and *Burlington*] do not control the present case- and, indeed all cases in which the plaintiff seeks to hold his employer vicariously liable for a supervisor's sexual harassment.'). Because, as pointed out in *Indest II*, the third member of the panel did not join either opinion, 'neither enjoys a quorum and thus neither writing constitutes precedent in [the Fifth] Circuit.' *Id.* at 796 n.1.

Second, we have effectively rejected the modified employer defense enunciated in *Indest.* In *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998), the plaintiff filed suit against her employer *1026 under Title VII alleging, in part, that she had been subjected to sexual harassment by her supervisor. The district court (prior to the issuance of *Faragher* and *Burlington*) granted summary judgment in favor of the employer on the grounds that 'the sexual harassment stopped after [plaintiff]

complained' about it to the employer's personal director. *Id.* at 1259. We reversed and remanded with directions to the district court to apply the two-pronged defense set forth in *Faragher* and *Burlington*. In doing to, we effectively rejected the position advanced in *Indest*, i.e., that an employer's prompt corrective action can be sufficient by itself to avoid vicarious liability under Title VII for sexual harassment committed by a supervisory employee.

Third, even assuming that *Gunnell* did not resolve the issue, the reasoning of *Indest* is highly suspect and, in our view, should not be adopted. As outlined in *Indest II*, there is no reason to believe that the 'remarkably straightforward' framework outlined in *Faragher and Burlington* does not control all cases in which a plaintiff employee seeks to hold his or her employer vicariously liable for a supervisor's sexual harassment. *Indest II,* 168 F.3d. at 796." *Harrison v. Eddy Potash, Id.*, 248 F.3d at 1025-1016.

It is respectfully contended that since this Court set forth the elements of the affirmative defense using the word 'and' that the lower courts must therefore apply the defense as adopted by requiring proof of both elements.

The Fourth Circuit Court of Appeals also has clearly expressed that both elements of the *Faragher/Ellerth* defense must exist prior to an employer being able to avail itself of the affirmative

defense. In *Smith vs. First Union National Bank* 202 F.3d 234, 244 (2000), the Fourth Circuit stated:

"In *Faragher* and *Ellerth*, the Supreme Court adopted the following test for vicarious liability in sexual harassment cases:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 118 S.Ct. at 2292-93 (citation omitted); *Ellerth*, 118 S.Ct. at 2270 (citation omitted). Smith does not allege that she suffered a tangible employment action due to Scoggins' harassment. First Union therefore can raise an affirmative defense to liability for Scoggins' harassment. First Union must prove both elements of the affirmative defense to avoid vicarious liability."

Like the Fourth, Fifth, and Tenth Courts of Appeals, the Equal Employment Opportunity Commission clearly believes that this Court requires that both elements of the *Ellerth/Faragher* defense established must be satisfied. As Judge Mallory stated in his dissent in *McCurdy vs. Arkansas State Police, supra,* 375 F.3d at 776, "Similarly, the EEOC takes the position that the *Ellerth/Faragher* defense requires proof of both elements, even though this result may appear 'harsh to a law abiding employer.' EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, June 18, 1999."

The Petitioner respectfully believes that Judge Mallory and Judge Richard S. Arnold have the proper interpretation of the *Ellerth/Faragher* affirmative defense. As Judge Mallory stated,

"In sum, I must respectfully dissent from the majority opinion. Unlike the majority, I believe that Judge Richard S. Arnold correctly analyzed the *Ellerth/Faragher* affirmative defense in his concurrence in *Todd vs. Ortho Biotech, Inc.,* 175 F.3d

595, 599 – 600 (8th Cir. 1999) (Arnold, Richard S., concurring.) Like Judge Arnold, I believe the taking of prompt and effective remedial action may mitigate damages; however, it does not create a complete defense to liability." *McCurdy vs. Arkansas State Police,* 375 F.3d at 776

CONCLUSION

Given the above, this Court should grant the writ of certiorari in order to ensure that there is uniformity nationwide in the application of the *Ellerth/Faragher* affirmative defense in hostile work environment cases arising under Title VII of the Civil Rights Act of 1964, as amended.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS

AUG 4 2003
JAMES W. McCORMACK, CLERK
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DEP.CLERK

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

JAMIE MCCURDY PLAINTIFF

VS. CASE NO. 4:02-CV -542 GTE

ARKANSAS STATE POLICE DEFENDANT

MEMORANDUM OPINION AND ORDER

Presently before the Court is the Defendant's Motion for Summary Judgment. The Plaintiff has responded and the Defendant has filed a reply brief.

The Court is now prepared to rule. The Defendant's motion will be granted.

I. Introduction

The Plaintiff is employed by the Arkansas State Police as a non-commissioned police radio dispatcher. On August 29, 2002, she filed suit against the Arkansas State Police and the State of Arkansas contending that she was discriminated against on the basis of her sex in violation of Title VII of the Civil Rights Act of 1964. See 42 U.S.C. § 2000e et seq. Specifically, she contends that Arkansas State Police Sergeant Darryl Hall sexually harassed her, and that the Defendants are liable for his conduct. Plaintiff did not sue Sergeant Hall.

On September 25,2002, the Court entered an Order dismissing separate Defendant the State of Arkansas from the case. Presently before the Court is the Arkansas State Police's Motion for Summary Judgment. A jury trial is scheduled for August 25,2003.

II. Factual Background

In her Complaint, the Plaintiff avers as follows:

On July 5, 2002, a supervisor of the Arkansas State Police, Sergeant Darryl Hall, while on the premises of the Arkansas State Police, wearing the uniform of a Sergeant of the Arkansas State Police, and during working hours, subjected Plaintiff to unwelcome and unsolicited actions, including but not necessarily the following:

a. The supervisor reached under Plaintiff s arm and grabbed her breast.

b. The Plaintiff jerked away from the supervisor, at which time the supervisor grabbed her arm and said "she had a hole in her shirt" and when Plaintiff looked down he stated, "stop looking at your tits."

c. The supervisor then sat down next to the Plaintiff and asked her where her uniform was and when Plaintiff responded that it was Friday (Friday being casual dress days), the supervisor stated that if he was the chief, [her] uniform would be panties and a tank top.

d. The supervisor then left the radio room and returned later, and started playing with Plaintiff s hair. The Plaintiff then attempted to leave the radio room and the supervisor told her to turn around and again put his fingers in her hair.

e. The Plaintiff was able to leave the radio room, but upon her return, supervisor, Sergeant Hall, was still present, and in conversation

stated that Plaintiff had a real nice voice on the radio and that she turned him on.

f. The supervisor then, without consent of the Plaintiff, and against her wishes, hugged her, pressing his body against hers, in an unwelcomed manner that any reasonable person would know a reasonable woman would object to.

The summary judgment record provides further details of the encounter between the Plaintiff and Sergeant Hall. On Friday, July 5, the Plaintiff was working the 3 :00 p.m. to 11 :00 p.m. shift in the Little Rock Communications Center with Operators Jeanie Hill and Tracy Wilson. At 5 :30, while Ms. Hill was out of the room, Sergeant Hall entered the room. Sergeant Hall had entered the room to await a trooper who was transporting an inmate from a hospital to a holding cell. The Plaintiff had met Sergeant Hall only once before. The Plaintiff alleges that upon entering the room, Sergeant Hall behaved in the manner described above.

After rebuffing Sergeant Hall's actions, the Plaintiff eventually left the Communications Center to go outside and smoke. After fifteen minutes, she

returned to the room knowing that Sergeant Hall was still present. Ms. Hill had returned to the room, and Trooper James Reid was also present. Sergeant Hall then allegedly touched the Plaintiffs hair, commented on her voice, and hugged her, as described above. The Plaintiff's encounter with Sergeant Hall lasted approximately one hour.

That night, the Plaintiff called Sergeant Shawn Garner to report Sergeant Hall's behavior. Sergeant Garner was not the Plaintiff's immediate supervisor, but was the highest ranking individual in the chain of command on duty that Friday night. The Plaintiff and Sergeant Garner met at 9:00 p.m. Later that night, Sergeant Garner called Sergeant Hall's direct supervisor, Lieutenant Gloria Weakland, at home, to report the Plaintiff s allegations. Lieutenant Weakland instructed Sergeant Garner to ensure that the Plaintiff and Sergeant Hall had no contact for the remainder of the weekend. Sergeant Garner responded that this would not be a problem, because the Plaintiff was near the end of her nightly shift, and was not scheduled to work again until the following Tuesday.

Upon arriving for work on Monday, July 8, Lieutenant Weakland informed her immediate supervisor, Captain Carl Kirkland, of the Plaintiff's allegations against Sergeant Hall. Later that day, Lieutenant Weakland and Captain Kirkland began interviewing those who witnessed the encounter.

At the conclusion of the interviews, Lieutenant Weakland and Captain Kirkland wanted to ensure that the Plaintiff and Sergeant Hall had no further contact with one another until an investigation had been completed. They instructed Telecommunications Supervisor Karen Boyer to assign the Plaintiff to south side radio duties when the Plaintiff and Sergeant Hall's north side shifts overlapped. Upon returning to work on Tuesday, July 9, the Plaintiff began her south side radio duties. Sergeant Hall was instructed not to have any contact with the Plaintiff.

Before discussing the Arkansas State Police's further investigation into the Plaintiffs allegations, the Court notes the Arkansas State Police Complaint Procedure, as described by the Defendant:

> The ASP's Field Operations Policy and Procedure Manual includes a section on how a

complaint of officer misconduct is reported and investigated. Upon receipt of a valid complaint of misconduct by an ASP officer, the commander shall have the complainant document the complaint by completing a Police/Citizen Complaint Form. Once the complainant completes the form, the Special Investigations Unit is responsible for investigating the alleged misconduct. The Policy and Procedure manual provides that the investigation should be completed within thirty days upon receipt of the complaint. Upon completion of the investigation, the investigating officer turns the investigation file over to the Division Commander, and if the investigating officer recommended disciplinary action, the Division Commander is responsible for convening a Disciplinary Review Board for further consideration of the matter. The DRB is to be made up of at least three members. Based on a majority decision, the DRB recommends the disciplinary action it deems appropriate based on the investigation.

Once the DRB completes its consideration of the matter, it refers the matter to the Assistant Directors for their review and recommendation to the Director. The Director renders a final decision by either adopting the majority recommendation of the DRB or disregarding the DRB's recommendation. The officer accused of misconduct may appeal the

> Director's decision to the Arkansas State Police Commission if the Director makes a determination of termination or several other disciplinary actions enumerated in the Policy and Procedure Manual. After a full hearing on the matter, the Arkansas State Police Commission may either approve the disciplinary action taken by the Director or enhance or diminish the action taken by the Director.

Captain Kirkland and Lieutenant Weakland reported the Plaintiff's allegations to the Special Investigations Unit ("Internal Affairs"). On July 10, upon the Arkansas State Police's request, the Plaintiff submitted to Captain Kirkland a memorandum detailing in writing her allegations, and the next day she again submitted her allegations on a Police/Citizen Complaint Form.

On July 10, Lieutenant Nathaniel Jackson, the officer in charge of Internal Affairs, was assigned to investigate the Plaintiff's allegations. After he conducted interviews of the relevant witnesses and analyzed the results of a polygraph examination given to Sergeant Hall, Lieutenant Jackson determined that Sergeant Hall had violated the Arkansas State Police's

Workplace Harassment Policy Numbers 28.020 and 28.030. These provisions state as follows:

28.020 Policy

It is the policy of the ASP that all employees have the right to work in an environment free of all forms of harassment and that all persons shall be treated fairly and equally, with dignity and respect. This agency does not condone and will not tolerate harassment in any form. Therefore, supervisors/employees shall take direct and immediate action to prevent such behavior, and to remedy all reported instances of harassment, sexual or otherwise.

28.030 Prohibited Activity

No employee shall either explicitly or implicitly ridicule, mock, deride or belittle any person.

Employees shall not make offensive or derogatory comments based on race, color, sex, religion or national origin either directly or indirectly to another person. Such harassment is a prohibited form of discrimination under state and federal law and is considered misconduct subject to disciplinary action up to and including termination of employment.

Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or
- Submission or rejection of such conduct by an employee is used as the basis for employment decisions affecting the employee; or
- Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment.

Behaviors which constitute sexual harassment include but are not limited to:

- Obscene gestures;
- Flirtatious whistling;
- Abusive comments, stereotyping, or jokes about individuals of the opposite sex.
- Explicit, derogatory sexual remarks;
- Placing obscene photographs, cartoons,, g, graphics, or sexually suggestive objects in any area occupied or observed by individuals of the opposite sex;
- Physical contact such as patting, grabbing, pinching, or constant brushing against another's body;
- Subtle requests for sexual activity;
- Any repeated or unwanted verbal or physical sexual advances which are offensive or objectionable to the recipient or which cause the recipient discomfort or humiliation or which interfere with the recipient's job performance; and

- The threat or insinuation that the lack of sexual cooperation will adversely affect the victim's employment, wages, promotion or other assigned duties.

Lieutenant Jackson completed his Investigative Summary on either July 17 or 18, and turned the file over to Captain Kirkland sometime prior to August 5. Upon a review of Lieutenant Jackson's investigation, Captain Kirkland determined that the Plaintiffs allegations were founded and that Sergeant Hall had violated the Arkansas State Police's harassment policy provisions noted above. Captain Kirkland further concluded that Sergeant Hall had also violated the Arkansas State Police Rules of Conduct pertaining to the use of course language and gestures, insubordination and improper conduct. Captain Kirkland recommended to Major J.R. Howard that Sergeant Hall be demoted to the rank of corporal, that he seek counseling for his behavior, and that he be placed on probation for one year with his actions closely monitored.

Around this time, on August 4, Captain Kirkland and Lieutenant Weakland transferred

Sergeant Hall from his patrol duties to a desk sergeant position. As noted, after the Plaintiffs allegations, she began working as a dispatcher for the south side while Sergeant Hall was on duty patrolling the north side. Though they had received no information that any radio contact between the two had taken place since the July 5 incident, Captain Kirkland and Lieutenant Weakland thought that it might be possible for the Plaintiff to cover a call from the north side patrol. Thus, they relieved Sergeant Hall of his patrol duties in an effort to further insulate the Plaintiff from him. Sergeant Hall was again instructed that he was to have no contact with the Plaintiff.

Upon receiving Captain Kirkland's recommendation, Major Howard appointed a Disciplinary Review Board to review the recommendation. The Board, consisting of Captain Larry Robinson, Captain G.B. Harp and Captain Timothy K'Nuckles, first convened on August 29. The Board also interviewed the relevant witnesses. During the course of the Plaintiff's interview, she revealed for the first time that Sergeant Hall had

twice, since July 5, called into the Communications Center and spoken to her about job-related matters. However, the Plaintiff acknowledged that Sergeant Hall did not say anything inappropriate or offensive during either of the two conversations. Nevertheless, in a further effort to insulate the Plaintiff from Sergeant Hall, he was transferred from his Little Rock-area duties to the Governor Security Detail. As part of the Governor's security team, he would have no reason to contact the Communications Center.

The Board concluded that variations existed in the Plaintiff's factual allegations, and requested that Sergeant Hall re-take, and the Plaintiff for the first time take, a polygraph examination. Captain Harp of the Board explained in his deposition why the Plaintiff was required to take the polygraph: "[T]here was some discrepancies in between the statement that she gave Lt. Jackson and what she was telling us."

After receiving the results of the polygraph examinations, the Board reconvened on September 5. The Board thereafter determined that Sergeant Hall had not violated Workplace Harassment Policy

Numbers 28.020 and 28.030, stating that the Plaintiff's allegations were "unfounded." Nevertheless, the Board concluded that Sergeant Hall had violated the Department's policies regarding improper conduct, course language and gestures and insubordination. The Board recommended that Sergeant Hall be transferred to another division in order to avoid future contact with the Plaintiff. Specifically, the Board's report stated:

Determination of the Disciplinary Review Board

The Board finds the initial allegations of Workplace Harassment # 2.020 [sic] and Sexual Harassment #28.030 alleged by the complainant Jamie McCurdy against Sergeant Hall are **unfounded.** There was not enough factual evidence presented to the Board to support Ms. McCurdy's claims.

The Board finds that Sergeant Hall violated the Department's policies on **Course Language and Gestures #4.020** and **Improper Conduct #4.080** because of the following:

> - Sergeant Hall admitted to and witnesses corroborated the *touching of Jamie's* [sic] *McCurdy's hair on two different occasions.*

- Sergeant Hall admitted to and witnesses corroborated the saying to Jamie, *that she had a sexy voice that turned him on.*
- Sergeant Hall admitted to saying, that *"if I was king that I would have everyone wear hot pants and halter tops* ".
- Sergeant Hall admitted to saying the word *tits* where Jamie McCurdy could have heard him.
- Sergeant Hall admitted that he could have made the statement to Jamie, *"do you have any black in you,* and witness Jeanne Hill corroborated that he did.

In addition, the Board finds Sergeant Hall in violation of ASP policy Insubordination-Truthfulness #4.060, whereas, he admitted, on tape, to Investigator Charlie Beall that he had been untruthful during the polygraph examination. The Board notes that during this investigation, Sergeant Hall was administered two-polygraph examination [sic] by two different examiners, and the results of both examinations showed him to be deceptive.

Recommendation of the Disciplinary Board

The Board recommends that Sergeant Hall be required to complete a psychological evaluation to determine his fitness for duty as an Arkansas State Police officer.

Should Sergeant Hall be found competent for duty as an Arkansas State Police officer, the Disciplinary

Review Board recommends a demotion to the rank of Corporal, and a transfer from the Highway Patrol Division in Troop A.

The Board's recommendation of disciplinary action for Sergeant Hall's violation of ASP policies **Course Language and Gestures #4.020** and **Improper Conduct # 4.080** would not have been as severe, if it was not for the untruthfulness he displayed during this investigation. The truthfulness of a supervisor is critical to every aspect of his job performance.

The Board forwarded its findings and recommendations to Lieutenant Colonel Steve Dozier. On September 16, Lieutenant Colonel Dozier recommended to Colonel Don Melton that Sergeant Hall be terminated for violating the Arkansas State Police's truthfulness policy. Colonel Melton agreed, and terminated Sergeant Hall's employment effective September 26.

Sergeant Hall appealed his termination to the Arkansas State Police Commission. After a November 15 hearing, the Commission overturned Colonel Melton's decision to terminate Sergeant Hall and adopted the Board's recommendation. The

Defendant notes: "The [Arkansas State Police Commission] is an agency unrelated to the [Arkansas State Police] and is created by statute. *See* Ark. Code Ann § 12-8-102, *et seq.*"

Upon Sergeant Hall's reinstatement, he was immediately transferred to the Forth Smith division, and demoted to the rank of corporal.

As further background information, the Court notes the following. In her complaint, the Plaintiff contends that Sergeant Hall's supervisors had prior knowledge of his inappropriate conduct towards female employees. No evidence in the summary judgment record supports this contention.

As noted, the July 5 encounter between the Plaintiff and Sergeant Hall was their second meeting. The Plaintiff contends for the first time in her brief that Sergeant Hall inappropriately touched her during their first meeting. Specifically, the Plaintiff states:

> The Plaintiff first encountered Sgt. Hall when he came into the radio room area [on an unspecified date] after Jimmy White, an Arkansas State Trooper, had been killed in an accident. At that time according to the Plaintiff, everyone was hugging each other

> concerning the grief felt for Trooper White's death. According to the Plaintiff, Sgt. Hall at that time touched her in an inappropriate manner by pressing against her breast. She gave Sgt. Hall the benefit of the doubt at that time because of the circumstances.

However, there is no evidence in the summary judgment record that the Plaintiff ever reported this incident to anyone within the Arkansas State Police.

In her complaint, the Plaintiff alleges that the Arkansas State Police was "aware of similar conduct by [Sergeant Hall] as a result of an article in the *Arkansas Democrat-Gazette* on or about October 13, 1995, involving testimony that occurred in the Jacksonville Municipal Court, concerning the conduct of [Sergeant Hall] by Jennifer Morris, Sandy Dyer, and Melissa Chisum." The summary judgment record reveals that the prior allegations against Sergeant Hall were made by individuals arrested by him, not fellow employees. In any event, the Arkansas State Police investigated the allegations and determined them to be unfounded (although Sergeant Hall was counseled not to place arrestees in the front seat of his patrol car). In any event, the Court concludes that Sergeant

Hall's conduct toward arrestees was not a reasonable basis for the Arkansas State Police to conclude that he was likely to harass co-workers.

In her brief, the Plaintiff argues that the Arkansas State Police was on notice that Sergeant Hall had a propensity for sexually harassing co-workers because he had been previously counseled for using profanity in the presence of co-workers. The Court disagrees, failing to see how an employee's use of profanity places the employer on notice of likely sexually harassing behavior. Furthermore, there is no evidence suggesting that Sergeant Hall's profanity was of a sexual nature, or that it was in the presence of or directed toward female employees.

III. Summary Judgment Standard

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See Lambert v. City o/Dumas,* 187 F.3d 931, 934 (8th Cir. 1999). Rule 56(c) of the Federal Rules of Civil Procedure provides the summary judgment standard and states that it may be granted "if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The Court will view the evidence and the inferences that may be reasonably drawn from the evidence in a light most favorable to the nonmoving party. *See Lambert,* 187 F 3d at 934. Summary judgment is to be granted only where the evidence is such that no reasonable jury could return a verdict for the nonmoving party. *See id.* To survive a summary judgment motion, a non-movant must provide sufficient, probative evidence that would permit a fact finder to rule in his favor as opposed to engaging in mere speculation, conjecture or fantasy. *See Kneibert* v. *Thompson Newspapers, Michigan Inc.,* 129 F 3d 444, 455 (8th Cir. 1997).

IV. Discussion

The Court is mindful that the Plaintiff did not sue her alleged harasser, but rather seeks to impose liability against the employer. A threshold issue to this analysis is whether Sergeant Hall possessed

supervisory authority over the Plaintiff. If he had no such authority, the *prima facie* elements discussed by the United States Court of Appeals for the Eighth Circuit in *Meriwether* v. *Caraustar Packaging Co.*, 326 F .3d 990, 993 (8th Cir. 2003), apply to the Plaintiff's claim. However, if Sergeant Hall possessed supervisory authority over the Plaintiff, the standard provided by the Supreme Court of the United States in *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998), is applicable.

The Defendant contends that Sergeant Hall had no supervisory authority over the Plaintiff and that they were merely co-workers. Specifically, the Defendant states:

> Darryl Hall, the alleged harasser..., is an ASP employee, who worked in Troop A as a sergeant. Sergeants only have supervisory authority over lower classified employees, such as ASP troopers and corporals, thus Hall had not supervisory authority over dispatchers, including [the Plaintiff]. Hall reported directly to Lt. Gloria Weakland. Commissioned ASP employees classified as a sergeant never had any supervisory control

over non-commissioned ASP employees working as a telecommunications operator.

The Defendant also stresses that it would not have been reasonable for the Plaintiff to view Sergeant Hall as a supervisor considering she had only met him once before July 5.

The Plaintiff contends that various affidavits establish that, though the dispatchers are not directly supervised by sergeants, the sergeants are viewed as supervisors because they are clearly higher in the chain of command. There is some evidence that the sergeants directed the day-to-day work activities of the dispatchers, as a sergeant is often the highest on-duty member of the chain of command. The Court notes that this was the case on the night of July 5. There is also some evidence that sergeants had disciplined dispatchers.

A question of fact exists as to whether Sergeant Hall possessed supervisory authority over the Plaintiff. Viewing the evidence in a light most favorable to the Plaintiff, as it must at the summary judgment stage, the Court concludes that, for purposes of the instant summary judgment motion

only, there is sufficient evidence to establish that Sergeant Hall possessed actual supervisory authority over the Plaintiff. *See Todd* v. *Ortho Biotech, Inc.*, 175 F 3d 595, 598 (8th Cir. 1999) (discussing actual supervisory authority)[1]; *see also Alverio* v. *Sam's Warehouse Club,* 9 F. Supp. 2d 955 (N.D. Ill. 1998)

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[1] And while it certainly seems that Sergeant Hall also possessed apparent authority over the Plaintiff, an apparent authority theory is not recognized as sufficient, in the absence of actual authority, to impose employer liability in a supervisory context. *See Kirkland v. The State University of Iowa,* No. 3-99-CV-30105, *2001 WL 737548, at *6 (S.D. Iowa 2001).* However, one Circuit Court Judge has opined that an apparent-authority analysis would not necessarily be inappropriate when the harasser is not in the plaintiff's direct chain of command, as is the situation in the instant case. *See Todd,* 175 F 3d at 599-600 (Arnold, J., concurring).

(discussing supervisor not in direct chain of command). Thus, in ruling on the summary judgment motion, the standard announced in *Ellerth* and *Faragher* is applicable.

The summary judgment record is clear that the Plaintiff suffered no tangible adverse employment action as part of Sergeant Hall's alleged harassment. Thus, the instant lawsuit is not a *quid pro quo* case. Rather, the question for the Court is whether Sergeant Hall's conduct subjected the Plaintiff to a sufficiently hostile work environment. *See Ellerth,* 524 U.S. at 751-67.

As a starting point, the Court notes the committee comment to the Eighth Circuit's Model Jury Instruction 5.42, addressing hostile work environments:

> It is impossible to compile an exhaustive list of the types of conduct that may give rise to a hostile environment sexual harassment claim under Title VII. Some examples of this kind of conduct include: verbal abuse of a sexual nature...; pinching, groping and fondling; suggestive, insulting, or obscene comments or

> gestures...; asking questions about sexual conduct; and unwelcome sexual advances.

The Supreme Court has also recognized that a court is to consider all the circumstances of the alleged conduct, including its frequency, it severity, whether it was physically threatening or humiliating, and whether it interfered with an employee's work performance. *See Faragher,* 524 U.S. at 787 -88. Simple teasing, offhand comments, and isolated incidents, unless extremely serious, will not constitute a hostile work environment, as Title VII is not meant to became a general civility code. *Id.* at 788.

Viewing the Plaintiff's allegations in a light most favorable to her, and finding a basis in the summary judgment record for her allegations, the Court concludes, only for purposes of the instant motion, that Sergeant Hall's alleged conduct was both objectively and subjectively offensive, and constituted a hostile work environment. The Court recognizes that the encounter lasted less than one hour, and was an isolated incident. Nevertheless, to have a supervisor, whom you had met only one time

prior, approach you from behind and grab your breast, and then proceed to fondle your hair and make sexually suggestive comments, is objectively offensive and was subjectively offensive to the Plaintiff, and constitutes a sufficiently hostile work environment.

In its Answer, the Defendant asserts the affirmative defense established by the Supreme Court in *Ellerth* and *Faragher*. With the determination that the Plaintiff was subjected to a sufficiently hostile work environment, the Defendant will be entitled to summary judgment in its favor only if no reasonable jury could find that it failed to prove the affirmative defense by a preponderance of the evidence. The affirmative defense created by the Supreme Court provides as follows:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, **and** (b) that the plaintiff employee

> unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807 (emphasis added). The Court further elaborated on the two elements of the defense:

> While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

Id. at 807-08.

The Court concludes that no reasonable jury could conclude that the Defendant failed to satisfy by a preponderance of the evidence the first element of the defense. The Arkansas State Police certainly exercised reasonable care to prevent sexual harassment by its employees, and it took prompt steps to avoid any further harassment of the Plaintiff by Sergeant Hall.

The organization had in place a detailed sexual harassment policy, and a procedure for reporting misconduct. *See supra.* The Plaintiff, who had been employed for approximately two months when the alleged harassment occurred, received a copy of the policy at the commencement of her employment. The Plaintiff also understood that she could, and she did, promptly report Sergeant Hall's alleged conduct. Furthermore, the organization also provided sexual harassment training to employees. Sergeant Hall had attended such a seminar in 1996.

The Arkansas State Police promptly took appropriate steps to insulate the Plaintiff from further contact with Sergeant Hall. Within hours of the

Plaintiff reporting the alleged conduct, the organization ensured that the two would not come into contact the remainder of the weekend. Upon the Plaintiff's return to work the following Tuesday, her job duties were modified to ensure that she would not receive any radio communications from Sergeant Hall, and Sergeant Hall was instructed to have no contact with the Plaintiff. Approximately one month later, as the investigation progressed up the chain of command, it was determined that it was still possible for the Plaintiff to receive radio contact from Sergeant Hall. Even though the Plaintiff had not reported any contact with Sergeant Hall, the Arkansas State Police reassigned Sergeant Hall from patrol to desk duties.

Thereafter, the Plaintiff reported that she had fielded two calls from Sergeant Hall. However, she confirmed that the two calls were job-related, and that Sergeant Hall had not said anything inappropriate or offensive. Nevertheless, the Arkansas State Police relieved Sergeant Hall of his Little Rock-based duties and transferred him to the Governor Security Detail,

where he would have no reason to call into the Plaintiff's communications center.

Furthermore, the Arkansas State Police promptly began its investigation on the Monday following the alleged harassment, the first business day after the incident. Interviews were commenced that day. Within one week, the investigating officers had requested and received a written statement from the Plaintiff, as well as her complaint form. Within one week, the investigation was turned over to the Internal Affairs department for further investigation. Within two weeks, Internal Affairs completed its investigation.

The investigation then proceeded further up the chain of command. The Disciplinary Review Board released its recommendation two months after the incident, and Colonel Melton fired Sergeant Hall some three weeks later. While the investigation may seem slow-moving, this is clearly a result of state law-mandated procedure and Arkansas State Police regulations, rather than any inaction by the

department. The record is clear that the Arkansas State Police responded promptly.

Even though the Arkansas State Police Commission overturned Sergeant Hall's termination, the Arkansas State Police transferred him from Little Rock to Fort Smith in an effort to insulate the Plaintiff from any further harassment.

The Plaintiff points out that the Disciplinary Review Board determined that her allegations of sexual harassment were "unfounded," and that Sergeant Hall was disciplined only for lying, improper conduct, and the use of course language and gestures. However, the fact that the Plaintiff's claims were not wholly substantiated is irrelevant.

Rather, the focus for the Court is whether the Arkansas State Police's response was prompt and appropriate. Clearly, the organization responded promptly and took reasonable care to ensure that the Plaintiff was insulated from Sergeant Hall. This insulation continued even after the Plaintiff's allegations were not wholly substantiated. The Court is mindful that Title VII does not obligate an

employer to terminate an employee who engages in sexual harassment. *See Bailey* v. *Runyon,* 167 F 3d 466, 468 (8th Cir. 1999). Rather, what an employer must do is take prompt remedial action reasonably calculated to end the harassment. *Id.* at 468-69. This is precisely what the Arkansas State Police did in the instant case. No reasonable jury could conclude otherwise.

Thus, the Plaintiff has satisfied the first element of the *Ellerth* and *Faragher* affirmative defense. As noted, the second element provides: "that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." This second element is not established by evidence in the summary judgment record. Clearly the Plaintiff took advantage of the Arkansas State Police's sexual harassment policy and promptly reported her allegations.

However, this Court questions the applicability of this second element to the facts of the instant case. Is the employer not entitled to an affirmative defense in the

situation where an employee promptly reports an isolated and first incident of sexual harassment, and the employer promptly takes steps to insulate the employee from further harassment and initiates a thorough investigation?[2] Surely not, for this is what Title VII expects of employers.

The Eighth Circuit has addressed this issue in *dicta:*

> The Supreme Court's new affirmative defense was adopted to avoid "automatic" employer liability and to give credit to employers who make reasonable efforts to prevent and remedy sexual harassment. *See Faragher,* 118 S.Ct. at 2291-92. But that defense, adopted in

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[2] The instant case is not one where the Plaintiff had failed to previously report past incidents of sexual harassment by the harasser, nor one where the employer had received past complaints about the harasser but done nothing. Rather, the summary judgment record reveals that the July 5 incident was the first time that the Plaintiff had been harassed by Sergeant Hall (viewing the evidence in a light most favorable to the Plaintiff, the Court does not conclude that the Plaintiff unreasonably failed to take advantage of the Arkansas State Police's sexual harassment policy upon her first meeting with Sergeant Hall), and that the Arkansas State Police had not received any previous reports about Sergeant Hall harassing female employees.

> cases that involved ongoing sexual harassment in a workplace, may not protect an employer from automatic liability in cases of single, severe, unanticipated sexual harassment unless, for example, the harassment does not ripen into an actionable hostile work environment claim until the employer learns that the harassment has occurred and fails to take proper remedial action. *See Indest* v. *Freeman Decorating, Inc.*, 164 F 3d 258, 265 (5th Cir. 1999). Though this is an issue of law, it is the kind of issue that is more properly addressed by the district court in the first instance.

Todd, 175 F .3d at 598.

The Court agrees that both *Ellerth* and *Faragher* involved situations of long term supervisor misconduct where the plaintiffs failed to report the misconduct or otherwise utilize available remedies. Thus, the Supreme Court cases establishing the affirmative defense are factually distinct from the instant case, a circumstance involving a "single, severe, unanticipated sexual harassment" that constitutes a sufficiently hostile work environment.

Upon this factual situation, the Court agrees with the analysis provided by Fifth Circuit Judge Edith Jones' opinion cited by the Eighth Circuit in *Todd.*[3] In *Indest,* Judge Jones essentially ignored the second element of the affirmative defense and held that the employer was entitled to summary judgment because it made a swift and appropriate remedial response to the employee's complaint. *See Indest* v. *Freeman Decorating, Inc.,* 164 F .3d 258 (5th Cir. 1999). Judge Jones stated in pertinent part:

> *Ellerth* and *Faragher* do not, however, directly speak to the circumstances before us, a case in which the plaintiff quickly resorted to [the employer]'s policy and grievance procedure against sexual harassment, and the employer took prompt remedial action.
>
> The Supreme Court cases both involve complaints of longstanding supervisor

[3] This Court recognizes that Judge Jones wrote for a three-judge panel of the Fifth Circuit, with the other two judges concurring in the judgment only. While Judge Jones' opinion may not constitute as precedent in the Fifth Circuit, *see Harrison v. Eddy Potash, Inc.,* 248 F.3d 1014, 1025 (10th Cir. 2001), this Court nevertheless finds Judge Jones' opinion to be the correct statement of the law. *See infra.*

> misbehavior, and the plaintiffs either never utilized or claimed not to be aware of the company policies. But for purposes of imposing vicarious liability, a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which a company was never called upon to react to a supervisor's protracted or extremely severe acts that created a hostile environment. Although the *Ellerth/Faragher* standard, which imposes vicarious liability subject to an employer's two-prong affirmative defense, does not control, it informs the principles determinative of this case.

Indest, 164 F.3d at 265.

The Court finds the following quotation from Judge Jones' opinion persuasive in reaching its conclusion that the Arkansas State Police is entitled to summary judgment because it had an established sexual harassment policy and grievance and investigatory procedure, the organization promptly responded to insulate the Plaintiff from further harassment, and promptly and thoroughly investigated the allegations. The Court recognizes that Judge Jones had not found a sufficiently hostile

work environment in the Fifth Circuit decision; nevertheless, the Court finds the quotation relevant to its own analysis.

> First, when a plaintiff promptly complains about a supervisor's inappropriate sexual actions, she can thwart the creation of a hostile work environment. To the extent redress is sought, is justified, and is adequately provided by the company, the complained-of incidents will not likely have become severe or pervasive enough to create an actionable Title VII claim. This result effectuates the purpose of Title VII, which cannot guarantee civility in the American workplace but, at its best, inspires prophylactic measures to deter unwanted sexual harassment. By promptly invoking a company's grievance procedure, a plaintiff has received the benefit Title VII was meant to confer. In such cases, an actionable hostile environment claim will rarely if ever have matured.
>
> Second, the company's swift response to the plaintiff's complaint should have consequences for its vicarious liability exposure precisely because the company forestalled the creation of a hostile environment. In cases like *Ellerth,* by contrast, the plaintiff's failure or delay in invoking anti-harassment procedures may suggest that a company lacked vigilance or determination to enforce them or that it appeared to turn a blind eye toward sexual harassment. The *Ellerth/Faragher* test more cautiously

exempts an employer from liability in the latter situation than is appropriate when a company has promptly reacted to a harassment claim and averted further distress.

A third, more fundamental reason also justifies distinguishing the *Ellerth/Faragher* test from the case before us. The Supreme Court felt obliged to square its new limited vicarious liability standard "with *Meritor's* holding that an employer is not 'automatically' liable for harassment by a supervisor who creates" a sexually hostile working environment. *Faragher*, 524 U.S. at ----, 118 S.Ct. at 2278. *Meritor* rejected imposing strict Title VII liability on employers for such claims. 477 U.S. at 72, 106 S.Ct. at 2408. *Meritor* was left in place in the Court's recent cases because of *stare decisis* and because, as the Court noted, Congress conspicuously left *Meritor* intact even as it modified other aspects of Title VII law in 1991. Most important, the Court acknowledged that *Meritor* furthers the twin deterrent and compensatory aims of Title VII. As *Faragher* put it:

> It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for

> misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.

524 U.S. at ----, 118 S.Ct. at 2292.

> Imposing vicarious liability on an employer for a supervisor's "hostile environment" actions despite its swift and appropriate remedial response to the victim's complaint would thus undermine not only *Meritor* but Title VII's deterrent policy. Vicarious liability would amount to strict liability even though the plaintiff had suffered neither a severe and pervasive change in her working conditions nor any adverse employment action. A holding of vicarious liability would conflict with cases, specifically approved by the Court, in which an employer's liability for co-worker sexual harassment is governed by a negligence standard, and the employer is liable only if it knew or should have known and failed to take proper remedial steps. *See Faragher,* 524 U.S. at ---- - ----. 118 S.Ct. at 2285-86. A standard imposing vicarious liability notwithstanding the employer's having nipped a hostile environment in the bud would also conflict with the premise of *Ellerth/Faragher,* founded in agency law, that a supervisor who creates a hostile environment is aided by his agency status with the employer in doing so. *See Faragher,* 524 U.S. 775, ----, 118 S.Ct. 2285, 2290. Where the company, on hearing a plaintiff's complaint about inappropriate sexual behavior, moves promptly

to investigate and stop the harassment, it eradicates any semblance of authority the harasser might otherwise have possessed.

Finally, *Faragher's* discussion of the avoidable consequences doctrine and an employee's duty to mitigate damages supports relieving the employer from liability in circumstances like those before us. *Faragher* explains the relevance of these concepts while discussing the prong of the affirmative defense that requires an employer to prove the employee's "unreasonable" failure to take advantage of company policies to avoid sexual harassment:

> If the victim could have avoided harm, no liability should be found against the employer who had taken reasonable care, and if damages could reasonably have been mitigated no award against a liable employer should reward a plaintiff for what her own efforts could have avoided.

Id. at 2292. *Faragher* implies that a plaintiff should not wait as long as it usually takes for a sexually hostile working environment to develop when the company has an effective grievance mechanism. If the plaintiff complains promptly, the then-incidental misbehavior can be stymied before it erupts into a hostile environment, and no actionable Title VII violation will have occurred.

> Applying the foregoing analysis to Indest's case, we hold that because she promptly complained of Arnaudet's harassing conduct, and because the company promptly responded, disciplined Arnaudet appropriately and stopped the harassment, the district court properly granted judgment as a matter of law to Freeman. Even if a hostile work environment claim had been stated, which is dubious, Freeman's prompt remedial response relieves it of Title VII vicarious liability.

Id. at 265-67.

Though the Tenth Circuit has specifically disagreed with the Fifth Circuit's holding in *Indest, see Harrison* v. *Eddy Potash, Inc.*, 248 F 3d 1014, 1024-26 (10th Cir. 2001), this Court concludes that the principles relied upon by Judge Jones are correct. Where an employer receives an allegation of sexual harassment, and the employer was not previously on notice of the alleged harasser's prior like- conduct or propensity to act, and the employer promptly insulates the complainant from further harassment and promptly investigations the allegations, the employer is entitled to a judgment as a matter of law. Surely this is what Title VII expects of employers.

V. Conclusion

IT IS THEREFORE ORDERED that the Defendant's Motion for Summary Judgment (Doc. # 18) be, and it is hereby, GRANTED. This case is dismissed on the merits with prejudice.

Dated this 4th day of August, 2003.

Garrett Thomas Eisele

UNITED STATES DISTRICT JUDGE

THIS DOCUMENT ENTERED ON DOCKET SHEET IN COMPLIANCE WITH RULE 58 AND/OR 79(a) FRCP ON 8 - 4 - 03 BY "JOY"

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3058

Jamie McCurdy;	)	
	)	
Plaintiff/Appellant,	)	Appeal from the United
	)	States District Court for
v.	)	the Eastern District of
	)	Arkansas
Arkansas State Police	)	
	)	
Defendant/Appellee	)	

Submitted: March 12, 2004

Filed: July 23, 3004

Before RILEY and MELLOY, Circuit Judges, and ERICKSON,[1] District Judge. RILEY, Circuit Judge.

This case asks whether an employer is strictly liable for a single incident of supervisor sexual harassment.[2] Jamie McCurdy (McCurdy), an employee of the Arkansas State Police, sued the State of Arkansas and the Arkansas State Police (collectively ASP), alleging the ASP should be vicariously liable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000), for the alleged sexual harassment perpetrated against McCurdy by her supervisor on one occasion over a

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[1] The Honorable Ralph R. Erickson, United States District Judge for the District of North Dakota, sitting by designation.

[2] The Honorable G. Thomas Eisele, United States District Judge for the Eastern District of Arkansas, determined that, for summary judgment purposes, the alleged harassment was perpetrated by a supervisor. The parties do not dispute this decision on appeal, and the record does not allow us to decide this issue as a matter of law. Therefore, we labor under the assumption the alleged harasser in this case was a supervisor.

one-hour period. The district court concluded the ASP's prompt remedial response to McCurdy's sexual harassment allegation shielded the ASP from liability: "Where an employer receives an allegation of sexual harassment, and the employer was not previously on notice of the alleged harasser's prior like-conduct or propensity to act, and the employer promptly insulates the complainant from further harassment and promptly investigat[es] the allegations, the employer is entitled to a judgment as a matter of law. Surely this is what Title VII expects of employers."

Accordingly, the district court granted summary judgment in the ASP's favor. McCurdy appeals. Concluding the district court correctly interpreted and applied Title VII and Supreme Court precedent to a case involving a single incident of supervisor sexual harassment, we affirm.

I. BACKGROUND

On April 28, 2002, McCurdy began her employment with the ASP as a radio dispatcher in

Little Rock, Arkansas. Upon her employment, McCurdy received a copy of the Non-Commissioned Personnel Manual. This manual contains a section prohibiting sexual harassment, which informs employees about the ASP's antiharassment policy, prohibited activities, employee's responsibilities, and how to complain about harassment in the workplace. McCurdy was assigned to work the evening shift, which ran from 3:00 p.m. to 11:00 p.m. McCurdy's immediate supervisor did not work the evening shift with McCurdy.

Viewing the evidence in the light most favorable to McCurdy, we glean the following events. On Friday, July 5, 2002, McCurdy worked the evening shift in the ASP Communications Center (Center) with Operators Jeanne Hill (Hill), a female, and Tracy Wilson (Wilson), a male. Several hours into McCurdy's shift, Sergeant Daryl Hall (Sergeant Hall) entered the Center while only McCurdy and Wilson were present. Hill was in another room at that time. McCurdy alleges Sergeant Hall walked into the

Center and immediately "cupped, touched, brushed against [McCurdy's] left breast." McCurdy states she "rejected the sexual advances." When she asked Sergeant Hall what he was doing, he responded, "Oh, stop it. You have a hole in your shirt." When McCurdy looked down at her shirt, Sergeant Hall said, "Stop looking at your tits."

Sergeant Hall then sat down and asked McCurdy where her uniform was, to which she responded it was Friday. Sergeant Hall replied, "Well, if I was the Chief, your uniform would be panties and a tank top." McCurdy did not respond. At about this time Hill reentered the Center. At some point, Sergeant Hall positioned his chair next to McCurdy, and then played with and twirled McCurdy's hair. He also asked McCurdy if she "had any black" in her. McCurdy told him her dad is Italian. After McCurdy and Sergeant Hall talked about dispatch duties, McCurdy left the Center to smoke a cigarette. Before McCurdy left the Center, she gave her cellular telephone number to Hill, asking Hill to call her if

Sergeant Hall left. McCurdy then called Hill and "kind of briefed her on what had happened, " informing Hill she was not returning while Sergeant Hall was in the Center. After ten or fifteen minutes outside, Trooper James Reid (Trooper Reid) arrived, and McCurdy and Trooper Reid went into the Center, knowing Sergeant Hall was still inside.

At that point, McCurdy, Trooper Reid, Wilson, Hill, and Sergeant Hall were in the Center. Sergeant Hall then told McCurdy she has "a really sexy voice on the radio. You kind of turn me on." As Sergeant Hall prepared to leave, he hugged McCurdy and Hill. McCurdy contends Sergeant Hall was in the Center "about an hour." After Sergeant Hall left the Center, McCurdy, Hill and Wilson spent about three hours discussing whether McCurdy should report the incident.[3]

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[3] The district court reported "the July 5 encounter between [McCurdy] and Sergeant Hall was their second meeting." Apparently, McCurdy contended for

McCurdy decided to report Sergeant Hall's behavior, and called Sergeant Shawn Garner (Sergeant Garner), the highest ranking person on duty. When Sergeant Garner arrived around 9:00 p.m., McCurdy told him about Sergeant Hall's conduct. Sergeant Garner called his supervisor, Lieutenant Gloria Weakland (Lieutenant Weakland), at home to notify her about McCurdy's allegations. Lieutenant Weakland "told Garner to ensure that McCurdy and Hall had no contact for the remainder

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the first time in her summary judgment brief that Sergeant Hall inappropriately touched her during their first meeting, which McCurdy described as follows: "[McCurdy] first encountered [Sergeant] Hall when he came into the radio room area after [a state trooper] had been killed in an accident. At that time according to [McCurdy], everyone was hugging each other concerning the grief felt for [the trooper]'s death. According to [McCurdy, Sergeant] Hall at that time touched her in an inappropriate manner by pressing against her breast. [McCurdy] gave [Sergeant] Hall the benefit of the doubt at that time because of the circumstances." The district court noted McCurdy presented no evidence that she reported this incident to the ASP.

of the weekend." Because McCurdy's shift was ending at 11:00 p.m., and she was not scheduled to work until the following Tuesday, Sergeant Garner assured Lieutenant Weakland that McCurdy would have no contact with Sergeant Hall.

When Lieutenant Weakland arrived at work on Monday, July 8, she informed her supervisor, Captain Carl Kirkland (Captain Kirkland), of McCurdy's allegations. That same day, Captain Kirkland and Lieutenant Weakland interviewed Trooper Reid, Hill, Wilson, Sergeant Hall and McCurdy. Monday McCurdy's day off, but she still reported to work to talk to Captain Kirkland and Lieutenant Weakland about the allegations. Over the weekend, McCurdy had contacted an attorney, and brought him to work on Monday to meet with ASP management. Wanting to ensure Sergeant Hall and McCurdy did not have contact with each other, Captain Kirkland and Lieutenant Weakland instructed McCurdy's supervisor to assign McCurdy radio duties so she would have no radio contact with Sergeant Hall while he was on patrol.

Instead of conducting their own internal investigation, Captain Kirkland and Lieutenant Weakland reported the allegations to the Special Investigations Unit (a.k.a., Internal Affairs). On July 10, Lieutenant Nathaniel Jackson (Lieutenant Jackson), the officer in charge of the Special Investigations Unit, was assigned to investigate McCurdy's complaints against Sergeant Hall. Also on July 10, McCurdy submitted to Captain Kirkland a two-page memorandum explaining the July 5 incident. On July 11, McCurdy submitted a Police-Citizen Complaint Form.[4] Lieutenant Jackson investigated McCurdy's complaint and delivered a

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[4] The ASP's Field Operations Policy and Procedural Manual guides the reporting and investigating of officer misconduct. When a misconduct allegation is made, the complainant is required to document the complaint on a Police-Citizen Complaint Form. After the ASP receives this form, the Special Investigations Unit has thirty days to complete an investigation of the complaint and report to the Division Commander.

written report to Captain Kirkland on August 5, 2002. In his report, Lieutenant Jackson concluded Sergeant Hall had violated the ASP's Workplace Harassment Policy. On August 5, Captain Kirkland reviewed Lieutenant Jackson's investigative report, and concurred that Sergeant Hall had violated the ASP's Workplace Harassment Policy. Captain Kirkland also concluded Sergeant Hall had violated other ASP Rules of Conduct regarding coarse language and gestures, insubordination, and improper conduct. In an August 5 memorandum to Major J .R. Howard (Major Howard), Division Commander, Captain Kirkland reported these findings, recommending "Sergeant [H]all be demoted to the rank of Corporal, . . . seek counseling for his sexually harassing behavior, and . . . be placed on one year probation with his actions closely monitored by the command staff." Captain Kirkland also informed Major Howard that Sergeant Hall had been reassigned from his patrol duties to a daytime desk position so he would have no contact with McCurdy.

Major Howard appointed a Disciplinary Review Board (DRB),[5] which convened on August 29. The DRB interviewed Captain Kirkland, Hill, Wilson, Sergeant Hall and McCurdy. McCurdy told the DRB she felt it was ridiculous she had to wait outside the DRB hearing room in a lobby area also occupied by Sergeant Hall, where he could watch her. She also reported for the first time to the DRB that, while she was working at the Center, she twice received business-related telephone calls from Sergeant Hall after the July 5 incident. Sergeant Hall did not say

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[5] The ASP's Field Operations Policy and Procedural Manual requires that, if an investigating officer recommends discipline, the Division Commander convenes a DRB to consider the matter. A majority of the three-person DRB then recommends the appropriate discipline. Assistant Directors then review the DRB's recommendation. The investigative file, including the recommendations of the DRB and the Assistant Directors, then goes to the Director for review. The Director thereafter renders a final decision. Depending on the nature of the discipline, the officer accused of misconduct may then appeal the Director's decision to the Arkansas State Police Commission (Commission). The Commission can approve, enhance or diminish the discipline against the accused officer

anything inappropriate during these calls. Because of these newly reported telephone calls, Captain Kirkland and Lieutenant Weakland transferred Sergeant Hall to work Governor Security Detail so he would have no reason to contact the Center or McCurdy. The DRB asked Sergeant Hall for a second polygraph examination and also asked McCurdy to submit to polygraph examination. The polygraph examiner noted McCurdy's response to the question, "Did Sergeant Hall touch your breast?" did not allow the examiner to form an opinion on truthfulness or was inconclusive. On September 10, the DRB found McCurdy's sexual harassment complaint "unfounded, " but found Sergeant Hall violated the ASP's rules on coarse language and gestures, improper conduct, and insubordination/truthfulness. The DRB recommended Sergeant Hall undergo a psychological evaluation to determine his fitness for duty, and, if competent for duty, be demoted to corporal and transferred from his patrol division.

The DRB reported its recommendation to Major Howard, and then the DRB's findings and recommendations were reviewed by Lieutenant Colonel Steve Dozier (Lieutenant Colonel Dozier). On September 16, Lieutenant Colonel Dozier forwarded the DRB's report to Colonel Don Melton (Colonel Melton), the ASP's Director, noting the "ASP Truthfulness Form (ASP-48A) plainly states that an employee will be terminated for knowingly and deliberately lying or making false statements while being questioned during an internal investigation." On September 26, Colonel Melton terminated Sergeant Hall's employment immediately, informing Sergeant Hall in writing that Colonel Melton found Sergeant Hall had violated the ASP's sexual harassment and insubordination/truthfulness policies. Colonel Melton informed Sergeant Hall he had a right to appeal his termination to the Commission.

Sergeant Hall appealed his termination to the Commission. The five-member Commission unanimously overturned Colonel Melton's decision to

terminate Sergeant Hall's employment for violating the ASP's policies on sexual harassment and insubordination/truthfulness. Thus, the ASP reinstated Sergeant Hall, but then immediately transferred him to Fort Smith, Arkansas, and demoted him to corporal.

McCurdy sued the ASP for the alleged sexual harassment perpetrated against her by Sergeant Hall. McCurdy has not sued Sergeant Hall, and the record does not indicate McCurdy ever filed criminal charges against Sergeant Hall. McCurdy argues "[s]he was subjected to an incident of harassment when a sergeant came into a radio room, made crude comments to her, and grabbed her breast." The district court held the ASP could not be vicariously liable for Sergeant Hall's conduct, and granted summary judgment to the ASP based on its entitlement to an affirmative defense.

McCurdy contends the district court misapplied the applicable affirmative defense, while the ASP argues the district court correctly granted the ASP

summary judgment based on its affirmative defense. The ASP also contends summary judgment was appropriate, because Sergeant Hall's conduct was not severe or pervasive enough to constitute actionable sexual harassment.

II. DISCUSSION

A. Standard of Review

We review de novo the district court's grant of summary judgment to the ASP. Mayer v. Nextel West Corp., 318 F.3d 803,806 (8thCir. 2003). Summary judgment is proper if the evidence, viewed in the light most favorable to McCurdy and giving her the benefit of all reasonable inferences, shows there are no genuine issues of material fact and the ASP is entitled to judgment as a matter of law. See id.; Fed. R. Civ. P. 56(c).

B. Hostile Work Environment

Title VII prohibits an employer from "discriminat[ing] against any individual with respect to h[er] compensation, terms, conditions, or privileges

of employment, because of such individual's. . . sex." 42 U.S.C. § 2000e-2(a)(1). Unlawful discrimination based on sex includes claims of hostile or abusive work environment sexual harassment. Meritor Sav. Bank. FSB v. Vinson, 477 U.S. 57,66 (1986). To establish a hostile work environment claim created by a supervisor, McCurdy must prove "(1) that she is a member of a protected group; (2) that she was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; and (4) that the harassment affected a term, condition, or privilege of employment." Hocevar v. Purdue Frederick Co., 223 F .3d 721,736 (8th Cir. 2000). Federal sexual harassment standards are demanding, and McCurdy must clear a high threshold to make an actionable claim requiring federal intervention in her workplace in the State of Arkansas. See Tuggle v. Mangan, 348 F.3d 714,720-21 (8th Cir. 2003) (citations omitted). Regardless of whether the single incident involving

McCurdy and Sergeant Hall meets the high threshold for actionable harm, we conclude the ASP's assertion of an affirmative defense shields it from liability.[6]

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[6] Given this fact scenario, some courts might conclude the single incident of Sergeant Hall's harassment was not severe or pervasive to constitute actionable sexual harassment. See, e.g., Clark County Sch. Dist. v. Breeden, 532 U.S. 268, 271 (2001) (holding single incident of sexual harassment, which was not extremely serious, was not actionable under Title VII); Meriwether v. Caraustar Packaging Co., 326 F .3d 990, 993 (8th Cir. 2003) (deciding a single incident of grabbing a co- worker's buttock with force near her upper thigh and later joking about the incident "does not rise to the level of severe or pervasive conduct" to be actionable); Mattson v. Caterpillar, Inc., 359 F .3d 885, 889 (7th Cir. 2004) (finding clearly no sexual harassment "when. . . breast allegedly brushed against his arm on a single occasion" and when the woman reached around claimant without touching). Such a decision avoids the question of employer liability for a single incident of supervisor sexual harassment. Because we conclude the ASP cannot be liable for Sergeant Hall's unauthorized conduct, we decline to address whether Sergeant Hall's conduct on July 5 constitutes actionable sexual harassment. See Burlington Indus.. Inc. v. Ellerth, 524 U.S. 742,754 (1998) (assuming the plaintiff had proved sexual

Before discussing the Supreme Court's creation of an affirmative defense in supervisor harassment cases, we begin with the crystal clear understanding that Title VII does not hold employers strictly liable for all sexual harassment perpetrated by supervisors. In Meritor, 477 U.S. at 63, the Supreme Court reviewed a D.C. Circuit Court of Appeals decision holding "an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct." The Supreme Court rejected this viewpoint, concluding "the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case." Id. at 73. The Court made clear "that employers are [not] always automatically liable for sexual harassment by their supervisors." Id. at 72. The Court recognized that Congress wanted courts to consider agency principles

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harassment, leaving only the issue of vicarious employer liability).

when determining employer liability under Title VII. Id. For support, the Court noted "Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." Id.

Twelve years after instructing courts not to hold employers strictly liable, and to consider agency principles when determining employer liability for supervisor harassment under Title VII, the Supreme Court confronted two cases involving multiple incidents of supervisor harassment. See Ellerth, 524 U.S. at 746-66; Faragher v. City of Boca Raton, 524 U.S. 775 (1998). The Court recognized that, "[s]ince our decision in Meritor, Courts of Appeals have struggled to derive manageable standards to govern employer liability for hostile environment perpetrated by supervisory employees." Faragher, 524 U.S. at 785. The Court also recognized that its only

discussion of a standard for employer liability, in Meritor, "involved a claim of discrimination by a supervisor's sexual harassment of a subordinate over an extended period." Id. at 791. The Supreme Court has never addressed the issue we confront today: an employer's liability for a single incident of sexual harassment perpetrated by a supervisor. [7]

In Ellerth, 524 U.S. at 747-48, a supervisor subjected an employee to near- constant sexual harassment, but the employee never reported the conduct to anyone in authority, although she knew about the employer's anti-harassment policy. Despite the harassing conduct, the employee suffered no tangible employment action. Id. at 766. Given these facts, the Court asked whether the employer had vicarious liability for the supervisor's harassment. Id. at 754.

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[7] Both Ellerth and Faragher involved multiple incidents of supervisor sexual harassment, while McCurdy has alleged only a single incident of harassment

Following Meritor's instruction, the Court once again considered agency principles when determining employer liability for supervisor harassment. Id. at 754- 65. The Court initially considered employer liability in the scope-of-employment context, but conceded "[t]he general rule is that sexual harassment by a supervisor is not conduct within the scope of employment." Id. at 757. The Court then addressed other agency principles to determine employer liability: when the employer's negligence causes the harassment (negligence standard); when the supervisor uses apparent authority to harass employees (apparent authority standard); and when the supervisor is aided in the harassment by the agency relation (aided in the agency relation standard). Id. at 759. Given the facts of the case, the Court focused on the aided in the agency relation standard, which "requires the existence of something more than the employment relation itself" Id. at 760. Based on the aided in the agency relation standard, the Court concluded employers are always liable "when a supervisor takes a tangible employment

action against the subordinate." Id. The Court considered a tangible employment action to be "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Id. at 761. The Court's rationale for holding employers vicariously liable for supervisor harassment resulting in a tangible employment action is straightforward: "When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted absent the agency relation." Id. at 761-62. However, the Court observed the question of "[w]hether the agency relation aids in commission of supervisor harassment which does not culminate in a tangible employment action is less obvious." Id. at 763.

When considering employer liability for supervisor harassment with no tangible employment action-as we confront in this case-the Court recognized agency principles are only part of the

liability equation. See id. at 764. The Court also acknowledged "Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context, and the EEOC's policy of encouraging the development of grievance procedures." Id. (citations omitted). The Court also recognized that, "[t]o the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose." Id.

Balancing "agency principles of vicarious liability" and "Title VII's equally basic policies of encouraging forethought by employers and saving action by objecting employees," the Court announced its holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with

> immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, which comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. at 764-65; Faragher, 524 U.S. at 807. The Court accentuated that "[n]o affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." Ellerth, 524 U.S. at 765; Faragher, 524 U.S. at 808; see also Pa. State Police v. Suders, 124 S. Ct. 2342,2352 (2004) (recognizing Ellerth and Faragher, which govern employer liability for supervisor sexual harassment, "delineate[d] two categories of hostile work environment claims: (1) harassment that 'culminates in a tangible employment action,' for which employers are strictly liable, and (2) harassment that takes place in the absence of a

tangible employment action, to which employers may assert an affirmative defense") (citation omitted).

In his dissent, Justice Thomas charged the Court with "manufactur[ing] a rule that employers are vicariously liable if supervisors create a sexually hostile work environment, subject to an affirmative defense that the Court barely attempts to define." Ellerth, 524 U.S. at 766 (Thomas, J., dissenting). Justice Thomas also stated that the Court's failure to explain how employers can use the newly crafted defense "provides shockingly little guidance about how employers can actually avoid vicarious liability," Id. at 773, "ensuring a continuing reign of confusion in this important area of the law." Id. at 771. Justice Thomas predicted that "employer liability very well may be the rule," which Congress clearly did not intend. Id. at 773-74. Finally, Justice Thomas forecasted "more and more litigation to clarify applicable legal rules in an area in which both practitioners and the courts have been begging for

guidance." Id. at 774. McCurdy's case fulfills the prophecy.

McCurdy first argues the ASP failed to conduct a proper investigation and take proper remedial action, which would negate the first element of the Ellerth/Faragher defense. We exhaust little effort to dispose of this hollow contention. It is indisputable that McCurdy suffered absolutely no harassment from Sergeant Hall - or anyone else at the ASP-after she complained the same day she was allegedly harassed. Although the ASP was unable to anticipate and prevent Sergeant Hall's harassment of McCurdy, the ASP's anti-harassment policy worked once the ASP was alerted to Sergeant Hall's offensive conduct. Immediately after McCurdy reported Sergeant Hall's offensive behavior, the ASP took all steps that could reasonably be expected of an employer promptly to investigate the report, insulate McCurdy from further offensive conduct, and take appropriate corrective measures. McCurdy's arguments to the contrary are without merit and completely lack support in the

record. To conclude the ASP failed promptly to correct Sergeant Hall's harassing behavior would require us to suspend logic and reason. We conclude the ASP did exactly what the Supreme Court's affirmative defense requires an employer to do-maintain an appropriate anti-harassment policy and promptly implement that policy when an employee complains about harassing conduct.

McCurdy also contends the Ellerth/Faragher affirmative defense is unavailable to the ASP because it cannot prove the necessary second element, i.e., that McCurdy "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the [ASP]." Without expressly advocating strict liability against the ASP for Sergeant Hall's behavior on July 5, McCurdy's argument, when boiled down, leads inevitably to strict liability for the ASP. However, Meritor's prohibition of automatic

employer liability for supervisor sexual harassment, Mentor, 477 U.S. at 71- 72, is still the rule.[8]

Strict adherence to the Supreme Court's two-prong affirmative defense in this case is like trying to fit a square peg into a round hole. We will not tire ourselves with such an exercise. Instead, we critically ask whether Title VII envisions strict employer liability for a supervisor's single incident of sexual harassment when the employer takes swift and effective action to insulate the complaining employee from further harassment the moment the employer learns about the harassing conduct.

As we answer this question, we begin with the obvious understanding that the Supreme Court, when it used the Ellerth and Faragher facts to craft the two-

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[8] In Faragher, the Supreme Court declared, "Meritor's statement of the law is the foundation on which we build today." Faragher, 524 U.S. at 792.

prong affirmative defense to strict liability, was not addressing an employer who takes swift and effective action the minute it learns of a single incident of supervisor sexual harassment. Judicially adopted defenses should not be viewed in a vacuum and blindly applied to all future cases. Instead, we should analyze these defenses based on the unique facts involved in the cases in which courts adopt the defenses. In Ellerth and Faragher, the Supreme Court confronted cases involving repeated incidents of supervisor sexual harassment. In contrast, we are confronted with McCurdy's case involving a single incident of alleged supervisor sexual harassment. Therefore, we ask whether the Supreme Court intended the Ellerth/Faragher affirmative defense to apply to this situation, or whether the Supreme Court intended employers in such situations to be strictly liable.

The Supreme Court in Meritor held that employers are not strictly liable for supervisor sexual harassment in the workplace. The Court's most recent

discussions of employer liability for supervisor harassment reaffirmed Meritor's no strict liability standard, except in cases where an employee can show she suffered a tangible employment action. We conclude the Supreme Court, in crafting the Ellerth/Faragher affirmative defense, did not change course in sexual harassment jurisprudence by holding employers strictly liable for single incidents of supervisor sexual harassment. Therefore, we hold the ASP is entitled to a modified Ellerth/Faragher affirmative defense, despite the ASP's inability to prove the second element.[9]

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[9] In addition to arguing the second prong of the affirmative defense does not apply to a case involving a single incident of supervisor sexual harassment, the ASP also argues it has established the second prong. Specifically, the ASP contends McCurdy admitted in her summary judgment brief that Sergeant Hall had inappropriately touched her breast before July 5 when he hugged her over the death of a colleague, but McCurdy failed to inform the ASP. Thus, the ASP

It is a fair question to ask who should bear the responsibility for a single incident of supervisor sexual harassment, an innocent employee like McCurdy or an employer like the ASP who effectively stops the harassment after it learns about it. One could argue the ASP should bear the risk of supervisor sexual harassment, as opposed to the innocent McCurdy. However, the Court has rejected this theory of vicarious liability. Id. Faragher, 524 U.S. at 796-801. To hold the ASP liable for Sergeant Hall's unauthorized acts would be to expand the scope of strict liability under Title VII. Expanding strict liability principles is better left to the Supreme Court, which has consistently held employers are not strictly

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contends McCurdy unreasonably failed to take advantage of the ASP's anti-harassment policy, entitling the ASP to summary judgment. Because we conclude the second prong of the affirmative defense does not apply to the facts of this particular case, we do not address the ASP's argument. We again note McCurdy alleged in her complaint and testified in her deposition only about the one incident on July 5, 2002, as the basis for her claim of sexual harassment.

liable for sexual harassment in the workplace absent a showing of tangible employment action.

The Ellerth/Faragher affirmative defense protects employers in harassment cases in which an employee fails to stop the harassment by using the employer's effective anti-harassment policy. The underlying theme under Title VII is employers should nip harassment in the bud. That is exactly what happened here. In this case, McCurdy admittedly suffered no tangible employment action.

To reach a conclusion that the affirmative defense is unavailable in single incident cases in which the employee takes advantage of preventative or corrective opportunities provided by the employer and the employer thereafter takes swift and effective action to avoid further offensive conduct stands the underlying policy behind the affirmative defense on its head. Denying such an employer an opportunity to avail itself of the affirmative defense, when the employer has done all that an employer could reasonably be expected to do to avoid and remedy the

offending behavior, effectively creates strict liability for employers in a single incident case-contrary to the Supreme Court's holding in Meritor. To hold otherwise would make the promise of an affirmative defense in single incident cases not involving a tangible employment action illusory-the pragmatic result would be to hold effective employers like the ASP strictly liable for all single incidents of supervisor harassment, while allowing other employers an affirmative defense for multiple and ongoing incidents of supervisor harassment. We decline the invitation to reach what appears to us to be an absurd result.

For example, if Sergeant Hall had engaged in his harassing conduct for months and McCurdy had not reported him, the ASP would not be liable for Sergeant Hall's harassment. However, because McCurdy felt comfortable to report Sergeant Hall's conduct within hours of it occurring, and the ASP quickly took action to assure Sergeant Hall never treated McCurdy in a distasteful manner again, the ASP would otherwise bear full responsibility and

liability for Sergeant Hall's single, unauthorized incident of harassment. Another scenario drives this bewildering result home. Had the ASP done absolutely nothing when McCurdy reported Sergeant Hall's conduct, and Sergeant Hall had not harassed McCurdy again, the ASP would be treated the same way it would be treated now-strictly liable. We cannot fathom how a court could logically follow a sound analytical path to reach these seemingly absurd results.

Even if the Ellerth/Faragher affirmative defense does not apply to this case, we still could not faithfully follow Supreme Court precedent if we held the ASP strictly liable for Sergeant Hall's conduct. Instead, the Supreme Court has clearly directed courts to follow agency principles to determine employer liability. Applying agency principles to determine the ASP's liability, we would still conclude the ASP is shielded from liability for swiftly and effectively ending McCurdy's harassment. Sergeant Hall had no authority, apparent or otherwise, to sexually harass McCurdy. This observation is buttressed by the ASP's

effective anti-harassment policy, McCurdy's near instantaneous complaint of the harassment, and the ASP's swift and effective response to the harassment complaint.

We also note this is not a typical supervisor harassment case. There is absolutely no evidence Sergeant Hall had the power to hire or fire, or set work schedules or pay rates for McCurdy or anyone else. Sergeant Hall was as close to a co-worker as a "supervisor" could get. Thus, no court could conclude Sergeant Hall was aided in the agency relation to harass McCurdy.

Finally, the ASP could not be liable under a negligence theory, because once McCurdy complained of Sergeant Hall's conduct, the ASP shielded McCurdy from further harassment by taking swift and effective action against Sergeant Hall to assure he never again harassed McCurdy.

The Eighth Circuit has made a cursory pass at whether the Ellerth/Faragher affirmative defense applies to cases involving a single incident of supervisor sexual harassment. In Todd v. Ortho

Biotech. Inc., 175 F .3d 595, 597-98 (8th Cir. 1999), the court pondered whether the Ellerth/Faragher affirmative defense applies to cases involving a single incident of sexual assault committed by a supervisor. The court recognized that the judicially created "affirmative defense was adopted to avoid 'automatic' employer liability and to give credit to employers who make reasonable efforts to prevent and remedy sexual harassment." Id. at 598 (citing Faragher, 524 U.S. at 803-07). The court further realized the affirmative defense was "adopted in cases that involved ongoing sexual harassment in a workplace," noting the defense "may not protect an employer from automatic liability in cases of single, severe, unanticipatable sexual harassment unless, for example, the harassment does not ripen into an actionable hostile work environment claim until the employer learns that the harassment has occurred and fails to take proper remedial action." Id.; see Indest v. Freeman Decorating, Inc., 164 F .3d 258, 265 (5th Cir. 1999) (recognizing "Ellerth and Faragher do not, however, directly speak to . . . a case in which the plaintiff quickly resorted to [the employer]'s policy

and grievance procedure against sexual harassment, and the employer took prompt remedial action") (Jones, J.). Although the court in Todd intimated our analysis should focus on whether the single incident of harassment constituted actionable sexual harassment, we instead directly address employer liability for the single incident of supervisor harassment [10]

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[10] Judge Richard S. Arnold, writing separately in Todd, recognized that the judicially created affirmative defense "is not always a complete defense to liability[, but] can also be a defense to damages only." Todd, 175 F .3d at 599 (citing Ellerth, 524 U.S. at 764-65) (Arnold, J. Richard S., concurring in the judgment). Judge Arnold posited that, "[i]f a supervisor abuses his authority to commit a sufficiently severe act of harassment, the employer's affirmative defense, if established, should serve to reduce the damages, but I don't understand why it should always erase the tort completely." Id. Perhaps this could be a workable rule-an employer is liable for a single incident of supervisor harassment, but the employer's liability for damages is reduced, or eliminated, based on the employer's swift and

Blindly following the Ellerth/Faragher affirmative defense in this case would actually develop a new rule never sanctioned by the Supreme Court. The new rule could be stated as follows: If an employee suffers a tangible employment action at the hands of a supervisor or endures a single incident of supervisor harassment, the employer is strictly liable

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effective response to the employee's harassment complaint For such a rule, we believe further guidance from the Supreme Court is required. Given the Supreme Court's discussion of employer liability from Meritor to Ellerth and Faragher, we glean an overriding theme that employers who have effective anti -harassment policies and take swift remedial measures when put on notice of harassing conduct have complied with Title VII, except where a supervisor takes a tangible employment action against the harassed employee, the employer negligently allows the harassment to continue, the supervisor uses apparent authority to harass an employee, or the supervisor is aided in the harassment by the agency relation. If these exceptions are absent, and an employer resolves a workplace issue of harassment at the first opportunity to do so, federal courts should not intervene to inform the employer it is still a discriminating employer in violation of Title VII.

under Title VII, and only when an employee suffers no tangible employment action-but endures a supervisor's consistent and repeated harassment-will the employer be afforded the shelter provided by the affirmative defense.

We conclude by applauding the ASP for its swift and effective response to McCurdy's report of the single incident of sexual harassment. Title VII forbids sexual harassment in the workplace, and the ASP followed this prohibition by having an appropriate anti-harassment policy and pursuing that policy when confronted with McCurdy's allegations of harassment.[11]

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[11] We note McCurdy's reply brief asks that we "not condone [Sergeant Hall's] behavior in the State of Arians." If McCurdy's ill-conceived reference to the State of Arkansas as the "State of Arians" was intentional, we disapprove of this type of behavior by an officer of this court. The reference is neither professional nor funny, and does not advance McCurdy's case. If McCurdy's "State of Arians"

III. CONCLUSION

For the foregoing reasons, we affirm the well-reasoned decision of the district court granting summary judgment to the ASP.

MELLOY, Circuit Judge, dissenting.

I must respectfully dissent from the majority opinion in this case.

The district court and the majority opinion both assume that the facts of this case create a jury question as to whether there is actionable sexual harassment. Although I believe that is a very close call, for all the reasons set forth in footnote number 6 of the majority opinion, my analysis proceeds on the same assumption.

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reference was inadvertent, we caution counsel to review more carefully his brief before submission to this court.

I do not believe that the majority opinion can be squared with the Supreme Court decisions in Faragher v. City of Boca Raton, 524 U.S. 775 (1998), and Burlington Industries. Inc. v. Ellerth, 524 U.S. 742 (1998), as well as our own precedents interpreting those two Supreme Court decisions. It is my reading of those cases that the only defense to liability by an employer for supervisor harassment is to establish both prongs of the affirmative defense set forth in Faragher and Ellerth. That is, the employer must show that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior and the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. See Burlington Industries. Inc. v. Ellerth, 524 U.S. at 765; Faragher v. City of Boca Raton, 524 U.S. at 807-08. In this case, the evidence clearly shows that the Arkansas State Police met the first element of the two prong test. It had a policy and took prompt and effective remedial action against Mr. Hall. Like the majority, I applaud the ASP for its

swift and effective response to McCurdy's report of the sexual harassment. However, because ASP cannot establish the second prong of the Ellerth/Faragher affirmative defense, I must conclude that it still remains liable if a jury ultimately concludes that Hall's conduct does rise to the level of sexual harassment.

It may be that the Supreme Court did not have a situation like this case in mind when it decided Faragher and Ellerth. In many, if not most cases, a single incidence of harassment, or as in this case, incidences that occur over less than an hour's time, will not normally rise to the level of being sufficiently severe and pervasive to constitute actionable harassment. However, I cannot read anything in Ellerth/Faragher that creates an exception to the two prong affirmative defense for those cases of single incident harassment that do rise to the level of actionable sexual harassment. As I read the Supreme Court cases, if there is supervisory harassment, whether it is a single or multiple incident, and the

employer cannot prove the plaintiff employee unreasonably failed to take advantage of any corrective opportunities, the employer will be liable, regardless of how effective and prompt its remedial action might have been.

The district court found that ASP had established the Ellerth/Faragher affirmative defense as a matter of law and relied primarily on the reasoning of a single member of the Fifth Circuit in Indest v. Freeman Decorating, Inc., 164 F. 3d 258 (5th Cir. 1999) (Indest I). The district court recognized that Indest I is not binding precedent in the Fifth Circuit because it represents the views of only a single member of the three-judge panel. The other two members of the panel concurred in the judgment only. In Indest v. Freeman Decorating, Inc., 168 F .3d 795 (5th Cir. 1999) (Indest II), one of the concurring judges, Judge Wiener, wrote a separate, concurring opinion and specifically rejected Indest I's reasoning insofar as it modified the Supreme Court's clear pronouncement of the twin elements of the Ellerth/Faragher

affirmative defense. Judge Wiener characterized the Supreme Court's Ellerth and Faragher opinions as "remarkably clear." 1.4:. at 796. He stated, "Under the Ellerth/Faragher rubric, an employer is vicariously liable for a supervisor's actionable hostile environment sexual harassment of an employee unless the employer can prove both elements of the one and only affirmative defense now permitted by the Court." Id. (footnote omitted).

Similarly, the EEOC takes the position that the Ellerth/Faragher defense requires proof of both elements, even though this result may appear "harsh to a law abiding employer." EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, June 18, 1999. This result, however, is tempered with the requirement that harassing conduct be severe and pervasive, because "[i]n most circumstances, if employers and employees discharge their respective duties of reasonable care, unlawful harassment will be prevented and there will be no reason to consider questions of liability." Id.

I believe the cases from our court interpreting the Ellerth/Faragher affirmative defense, lend further support for my position. In Moisant v. Air Midwest.

Inc., 291 F.3d 1028, 1030 (8th Cir. 2002) the court discussed circumstances under which an employer may be held liable under Title VII for the acts of a supervisory employee whose sexual harassment created a hostile work environment. The court held that an employer is vicariously liable unless the employer can affirmatively show, among other things, that the employee unreasonably failed to take advantage of any preventive or corrective opportunities that may have been provided. The court went on to state:

> Although, Air Midwest acted promptly to provide appropriate remedies for the events of which Ms. Moisant complained, that does not immunize them from the vicarious liability that Faragher imposes. In granting judgment as a matter of law, perhaps the district court had in mind the rule that prompt remedial action will shield an employer from liability when the complaint against it is bottomed on acts committed by a plaintiff's co-worker rather than a supervisor. See e.g., Bailey v. Anchor Packaging, 216 F .3d 720, 720 (8th Cir. 2000) (per curiam). But that is not this case. The present case was tried, at least partly, on the theory that Mr. Stillwell was Ms. Moisant's supervisor, and there was ample evidence in the record that he was her

> supervisor as that term is defined in the relevant cases. See Faragher, 524 U.S. at 807, 118 S. Ct. 2275; see also Todd v. Ortho Biotech. Inc., 175 F.3d 595, 598 (8th Cir. 1999). It follows that the district court erred with respect to Ms. Moisant's hostile environment claim and that the court's judgment must in this respect be reversed.

Id. at 1031. Granted, Moisant dealt with the situation involving three incidents of sexual harassment, two of which were reported to the employer. However, I see nothing in Moisant which would indicate that a different result would obtain if there had only been one incident of sexual harassment that was promptly reported to the employer.

In sum, I must respectfully dissent from the majority opinion. Unlike the majority, I believe that Judge Richard S. Arnold correctly analyzed the Ellerth/Faragher affirmative defense in his concurrence in Todd v. Ortho Biotech Inc., 175 F .3d 595, 599-600 (8th Cir. 1998) (Arnold Richard S., concurring). Like Judge Arnold, I believe the taking of prompt and effective remedial action may mitigate

damages; however, it does not create a complete defense to liability.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3058

Jamie McCurdy;	)	
	)	
Plaintiff/Appellant,	)	
	)	Order Denying Petition
v.	)	for Rehearing and for
	)	Rehearing En Banc
Arkansas State Police	)	
	)	
Defendant/Appellee	)	

September 7, 2004

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Murphy, Judge Bye, Judge Melloy and Judge Smith would grant the petition for rehearing en banc.